STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER MOZAL,

Plaintiff-Appellant,

v

JANET MARIE WEISS, BARBARA ANN WEISS,[1] and SARAH ANNE POWERS,

Defendants,

and

KRISTINA NOBLIT,

Defendant-Appellee.

UNPUBLISHED
March 13, 2008

No. 276931
Macomb Circuit Court
LC No. 2003-004199-NI

CHRISTOPHER MOZAL,

Plaintiff-Appellant,

v

STATE FARM INSURANCE COMPANY,

Defendant-Appellee.

No. 276933
Macomb Circuit Court
LC No. 2004-003727-CK

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[1] There is an inconsistency in the reference to Barbara Weiss in the papers filed by the parties. The lower court filings, including the order of dismissal with regard to this defendant, indicate that her middle name is "Jean." The opinion and order issued by the trial court granting defendant Noblit's motion for summary disposition indicates that the middle name of defendant Barbara Weiss is "Jean." However, the opinion and order issued by the trial court granting defendant insurance company's motion for summary disposition indicates that the middle name of defendant Barbara Weiss is "Ann." The appellate briefs filed by the parties refer to "Barbara Ann Weiss." This discrepancy is irrelevant to the resolution of the issues raised on appeal.

Before: Murray, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

In this consolidated case, plaintiff appeals as of right from the trial court's orders granting defendants' motions for summary disposition. We affirm.

In July 2003, plaintiff was a passenger in a vehicle driven by defendant Noblit. At that time, plaintiff and defendant Noblit had been involved in a dating relationship for approximately three years. Defendant Noblit observed a vehicle in the roadway ahead with its hazard lights flashing. She could not immediately determine if the vehicle was stopped in the roadway. Defendant Noblit began to slow her vehicle down and was unable to move into the right lane of traffic. She had to stop in the roadway behind the disabled vehicle. Defendant Noblit asked the disabled travelers if they needed to use her cell phone. She turned off her vehicle and turned on her own hazard lights. Plaintiff exited the passenger door, went to the disabled vehicle, attempted to start it, and looked under the raised hood. Plaintiff proceeded to the trunk of defendant Noblit's vehicle to retrieve his toolbox. At that time, plaintiff was struck by another vehicle and was seriously injured. Before the accident, plaintiff and defendant Noblit did not have any indication that the accident was about to occur. That is, there was no horn or sound of screeching tires from the colliding vehicle to warn them of the imminent contact.

Plaintiff filed a complaint raising negligence against the operator of the disabled vehicle, defendant Sarah Anne Powers, and the owners and operators of the vehicle that caused the collision, defendants Janet Marie Weiss and Barbara Ann Weiss.[2] Plaintiff filed an amended complaint that added defendant Noblit to the litigation and also raised a claim of negligence against her. Specifically, with regard to defendant Noblit, it was asserted that she failed to make proper observation of other vehicles, failed to warn plaintiff of other vehicles, and failed to place her vehicle in a safe location. Defendant Noblit filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). She asserted that she did not have a duty to protect plaintiff from the actions of a third party. The trial court agreed and granted defendant Noblit's motion.

Plaintiff also filed a separate action against defendant insurance company, his provider based on his mother's policy, for payment of benefits, but by order of the trial court, it was consolidated with the negligence action. In the negligence action, a stipulation was filed that admitted the negligence of defendant Janet Weiss, the driver of the vehicle that caused the collision and injuries to plaintiff. On March 6, 2004, this defendant offered to stipulate to entry of judgment in favor of plaintiff in the amount of $100,000. On March 15, 2004, plaintiff filed a counteroffer to stipulate to a judgment in the amount of $250,000 "against defendants." There is no indication in the lower court record that this counteroffer was accepted.

Defendant insurance company moved for summary disposition of plaintiff's claim for uninsured motorist benefits pursuant to MCR 2.116(C)(10) by relying on the offer to stipulate to entry of judgment. Specifically, it was asserted that the terms of plaintiff's insurance policy

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[2] These defendants are not parties to this appeal.

provided for essentially a set off of benefits paid or benefits payable from any person who is or may be held legally responsible for bodily injury to the insured. Consequently, defendant insurance company claimed that the offer of judgment by defendant Weiss precluded the payment of uninsured motorist benefits pursuant to the terms of plaintiff's insurance coverage. In response, plaintiff asserted that actual payment not potential payment was necessary to invoke the provision and that the language of the insurance policy was ambiguous. The trial court disagreed with plaintiff and granted defendant insurance company's motion for summary disposition.

Summary disposition decisions are reviewed de novo on appeal, viewing the evidence in the light most favorable to the nonmoving party. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id*. Affidavits, depositions, and documentary evidence offered in support of and in opposition to a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

I. Docket No. 276931

Plaintiff asserts that the trial court erred in granting summary disposition of the negligence action raised against defendant Noblit. We disagree. To establish a prima facie case of negligence, a plaintiff must prove that: (1) the defendant owed a duty to plaintiff; (2) the defendant breached the duty; (3) the breach of duty was a proximate cause of injury; and (4) damages. *Taylor v Laban*, 241 Mich App 449, 452; 616 NW2d 229 (2000). Duty is any obligation owed by the defendant to the plaintiff to avoid negligent conduct, and whether a duty exists generally presents a question of law for the court. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). An individual generally has no duty to protect another who is endangered by the conduct of a third person. *Jenks v Brown*, 219 Mich App 415, 420-421; 577 NW2d 114 (1996). An obligation to aid or protect another may arise when there is a special relationship that exists between the plaintiff and the defendant. *Taylor*, *supra*.

"[T]he ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty." *Miller v Ford Motor Co*, 479 Mich 498, 505; 740 NW2d 206 (2007). To satisfy this inquiry, there are a number of relevant considerations that include the relationship of the parties, the foreseeability of the harm, the burden that would be imposed on the defendant, and the nature of the risk presented. *Id*. at 505, 508. Before a duty will be imposed, there must be a relationship between the parties, and the harm must be foreseeable. *Id*. at 509. If that inquiry is satisfied, the court must examine the burden on the defendant and the nature of the risk presented to determine if a duty exists. *Id*. A special relationship has been imposed between common carriers and passengers, innkeepers and guests, and employers and employees. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). The rationale for imposing a duty to protect in the context of a special relationship is the element of control. *Id*. A special relationship with an attending duty to protect exists when one person entrusts himself to the control and protection of another with a loss of control to protect oneself. *Id*. "The duty to

protect is imposed upon the person in control because he is best able to provide a place of safety." *Id*.

In the present case, a special relationship between plaintiff and defendant Noblit did not exist that would give rise to a duty to protect and warn. The two were traveling in a vehicle together when they came upon a disabled vehicle. When defendant Noblit yelled to the disabled travelers if they needed a cellular telephone, plaintiff had exited the passenger side of the vehicle. There was no indication that defendant Noblit exercised any control over plaintiff's decision to attempt to aid the occupants of the disabled vehicle. Moreover, there is no indication that plaintiff entrusted himself to defendant Noblit and lost the ability to protect himself. *Williams*, *supra*. Accordingly, the trial court did not err in granting summary disposition in favor of defendant Noblit.

II. Docket No. 276933

Plaintiff asserts that the trial court erred in granting summary disposition in favor of defendant insurance company. We disagree. The construction and interpretation of an insurance contract presents a question of law for the court. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). An insurance contract is enforced according to its terms, and the court will not hold the company liable for a risk that it did not assume. *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 82; 730 NW2d 682 (2007) quoting *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353-354; 596 NW2d 190 (1999). An ambiguity cannot be found if the terms of the contract are clear and precise; rather, the contract terms must be enforced as written. *Id*. Courts must give the ordinary and accepted meaning to the mandatory word "shall" and the permissive word "may" unless to do so would clearly frustrate the legislative intent or the reading of the statute as a whole. *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982).

The policy at issue contained a provision addressing the limits of liability with regard to uninsured motorist coverage and provided in relevant part:

> 2. Any amount payable under this coverage shall be reduced by any amount paid or payable to or for the ***insured***:
>
> a. by or for any ***person*** or organization who is or may be held legally liable for the ***bodily injury*** to the ***insured***; [Emphasis in original.]

Review of the plain language of the policy reveals it was mandatory, as evidenced by the use of the word shall, *Browder*, *supra*, that uninsured motorist coverage by reduced by any amount paid or payable to the insured. The term "payable" is defined as: "1. to be paid; due … 2. capable of being or liable to be paid." Random House Webster's College Dictionary (2000), p 973. Thus, it was not required that payment actually occur. Rather, the insurance policy provided for a set off of coverage by amounts liable to be paid or that were due. In the present case, defendant Janet Weiss admitted liability for striking plaintiff when he was at the back of defendant Noblit's vehicle, and she further offered to pay a judgment in the amount of $100,000. Further, subsection (a) provides that the amounts paid or payable are by a person who "is or *may be held legally liable* for the bodily injury to the insured." (Emphasis added). In the present case, defendant Janet Weiss admitted her negligence and the only remaining question involved the

amount of damages. Thus, payment was due from Weiss for her admitted negligence with the amount of damages outstanding. Therefore, the policy set off provision was triggered. Accordingly, the trial court did not err in granting defendant insurance company's motion for summary disposition. The plain language of the policy at issue provided for a set off of uninsured motorist benefits against other monetary recovery. The policy did not require actual payment of the benefits before any set off occurred.[3]

Affirmed.

/s/ Christopher M. Murray
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood

[3] We note that defendant insurance company asserts that after the trial court ruled on its motion for summary disposition, plaintiff accepted the policy coverage offered by defendant Weiss and that this policy coverage of $100,000 exceeded the uninsured motorist coverage of $20,000 available to plaintiff through his policy of insurance. Thus, it is asserted that the amount paid provision of the policy is satisfied. We have no record evidence regarding these assertions because there is no supporting documentation contained in the lower court record. Rather, on November 30, 2005, a stipulated order of dismissal provided that the cause was dismissed against defendants Janet Marie Weiss and Barbara Jean Weiss "with prejudice and without costs." There is no documentation preserved in the record to indicate that the settlement was accepted and paid. However, plaintiff did not file a reply brief to dispute that a settlement occurred and that payment was made. In light of the policy language, we need not address actual payment.